Supreme Court, U.S.
FILED
NOV 12 1999
OFFICE OF THE CLERK

(12) (8)

Nos. 99-5, 99-29

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES, *Petitioner,*

v.

ANTONIO J. MORRISON AND
JAMES LANDALE CRAWFORD, *Respondents.*

CHRISTY BRZONKALA, *Petitioner,*

v.

ANTONIO J. MORRISON AND
JAMES LANDALE CRAWFORD, *Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF SENATOR JOSEPH R. BIDEN, JR. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 13981, the provision of the Violence Against Women Act of 1994 that creates a private right of action for victims of gender-motivated violence, is a valid exercise of Congress' power under the Commerce Clause of the Constitution.

2. Whether 42 U.S.C. § 13981 is a valid exercise of Congress' power under the Enforcement Clause of the Fourteenth Amendment to the Constitution.

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INTEREST OF AMICUS CURIAE[1]

Senator Joseph R. Biden, Jr. is the author of the Violence Against Women Act, which includes the civil rights remedy at issue in this case. The Act enjoyed tremendous bipartisan support, with 68 cosponsors in the Senate and 226 cosponsors in the House of Representatives, and passed both Houses by overwhelming margins.

As a former Chairman of the Senate Judiciary Committee, chief sponsor of the Act, and champion of its civil rights remedy, Senator Biden is uniquely qualified to offer the congressional perspective as to why the civil rights provision is both necessary and within Congress' power, pursuant to the Commerce Clause and § 5 of the Fourteenth Amendment. He believes that his detailed description of the statute's history and supporting legislative record will aid the Court in resolving the issues presented.[2]

STATEMENT

1. Senator Biden first introduced the Violence Against Women Act in 1990 "in response to the escalating problem of violence against women," S. Rep. No. 103-138, at 37 (1993) ("1993 S. Rep.")—an unfolding "national tragedy played out every day in the lives of millions of American women at home, in the workplace, and on the street." S. Rep. No. 102-197, at 39 (1991) ("1991 S. Rep."). During the four-year investigation that followed, Congress heard testimony from a wide range of

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[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, has made a monetary contribution to the preparation or submission of this brief. All parties to these consolidated cases have consented to the filing of this brief, and the letters of consent have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[2] Senator Biden also has written a law review article defending the constitutionality of the Violence Against Women Act civil rights remedy. The article is expected in print this January. *See* Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 Harv. J. on Legis. (forthcoming Jan. 2000).

experts, including judges, law enforcement officers, prosecutors, state attorneys general, law professors, social scientists, physicians, and victims of violence, and generated a massive legislative record in support of the legislation.[3]

As detailed below, the legislative record amassed by Congress after years of testimony and close analysis demonstrates that violence against women was (and is) a national problem of the first order, a problem that Congress found seriously impeded women from participating fully in the commercial life of the nation—and one that state legal systems had been both unable and unwilling to remedy.

2. Senator Biden introduced the Violence Against Women Act, comprehensive federal legislation to combat violent crime against women, in each of the 101st through 103d Congresses. *See* S. 2754, 101st Cong. (1990); S. 15, 102d Cong. (1991); S. 11, 103d Cong. (1993). Companion legislation was introduced in the House. H.R. 5468, 101st Cong. (1990); H.R. 1502, 102d Cong. (1991); H.R. 1133, 103d Cong. (1993). The Act enjoyed tremendous bipartisan support and passed both

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[3] *See, e.g., Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary,* 103d Cong. (1994) ("1994 H.R. Hrg."); *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 103d Cong. (1993) ("1993 H.R. Hrg."); *Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary,* 103d Cong. (1993) ("Nov. 1993 S. Hrg."); *Violent Crimes Against Women: Hearing Before the Senate Comm. on the Judiciary,* 103d Cong. (1993) ("Apr. 1993 S. Hrg."); *Hearing on Domestic Violence: Hearing Before the Senate Comm. on the Judiciary,* 103d Cong. (1993) ("Feb. 1993 S. Hrg."); *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary,* 102d Cong. (1992) ("1992 H.R. Hrg."); *Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary,* 102d Cong. (1991) ("1991 S. Hrg."); *Women and Violence: Hearings Before the Senate Comm. on the Judiciary,* 101st Cong. (1990) ("1990 S. Hrg."); *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources,* 101st Cong. (1990) ("1990 S. Labor Hrg.").

Houses by overwhelming margins.[4] After a conference to work out differences between the two bills,[5] both legislative bodies adopted the Conference Report, 140 Cong. Rec. 24,115 (1994) (Senate passage); 140 Cong. Rec. 23,618 (1994) (House passage), and on September 13, 1994, the President signed into law the Violent Crime Control and Law Enforcement Act of 1994, which included the Violence Against Women Act.

3. In addressing violence against women, Congress employed "several different complementary strategies," 1991 S. Rep. 34, to attack the problem on all fronts. A key subtitle in this multifaceted legislative scheme, the Civil Rights Remedies for Gender-Motivated Violence Act, creates a new federal civil cause of action that allows victims of gender-motivated violence to sue their attackers in court. *See* Pub. L. No. 103-322, Title IV, Subtitle C, §§ 40301-40303, 108 Stat. 1941-42 (codified at 42 U.S.C. § 13981). The civil rights remedy was among the most closely considered provisions of the Violence Against Women Act. After years of expert testimony and careful deliberation, Congress concluded that the provision was necessary; Congress

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[4] S. 11, reported favorably by the Senate Judiciary Committee in 1993, claimed a total of 68 cosponsors; its House counterpart, H.R. 1133, 226 cosponsors. The Senate amended the pending crime bill, S. 1607, 103d Cong. (1993), to include the Violence Against Women Act, by a vote of 94 to 4, 139 Cong. Rec. 27,547 (1993), and then incorporated the bill into the House version, H.R. 3355, 103d Cong. (1993), which the Senate passed on November 19, 1993. 139 Cong. Rec. 30,588 (1993). The House initially passed the Violence Against Women Act as H.R. 1133 on November 20, 1993, by the unanimous vote of 421 to 0. 139 Cong. Rec. 31,337 (1993). On April 14, 1994, the House again passed the Act as part of a crime bill, H.R. 4092, 103d Cong. (1994), which the House then incorporated into H.R. 3355. 140 Cong. Rec. 8141-42 (1994).

[5] One issue was whether to include the civil rights remedy. To avoid potential opposition, the House Judiciary Committee dropped the civil rights provision from H.R. 1133 before reporting it favorably out of committee. *Compare* H.R. Rep. No. 103-395, at 1-24 (1993) ("1993 H.R. Rep.") (as amended), *with* H.R. 1133, Title III, § 301 (as introduced). The civil rights remedy was not included in the versions of the Act which initially passed the House; however, the provision was restored in Conference. *See* H.R. Conf. Rep. No. 103-711, at 385 (1994) ("H.R. Conf. Rep.").

further determined in both the statutory text, § 13981(a), and committee findings that it had the power to enact the provision pursuant to both the Commerce Clause, U.S. Const. art. I, § 8, and § 5 of the Fourteenth Amendment. For the reasons set forth below, that determination was correct.

SUMMARY OF ARGUMENT

This case is one of exceptional importance because it tests whether Congress has power to address significant national problems that it has determined obstruct interstate commerce and threaten principles of equality, and to which the states have proved unable to respond. The court of appeals held that the civil rights remedy of the Violence Against Women Act, legislation designed to address one such national problem, exceeded Congress' authority under both the Commerce Clause and § 5 of the Fourteenth Amendment. The court was in error.

In *United States v. Lopez*, 514 U.S. 549 (1995), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court invalidated acts of Congress because Congress failed to make the case for federal action. In *Lopez*, the Court struck down the Gun-Free School Zones Act in part because gun possession near schools had no evident connection to interstate commerce, and Congress had made no findings that would have aided the Court in evaluating the legislative judgment. Similarly, in *Boerne*, the Court found the Religious Freedom Restoration Act an impermissible legislative effort to redefine the meaning of the First Amendment because the legislative record failed to support a narrower, clearly legitimate aim of redressing laws that unconstitutionally discriminated against religious beliefs and practices.

1. The Violence Against Women Act civil rights remedy is different. After four years of exhaustive hearings, Congress made the specific findings and developed the extensive record lacking in the statutes recently invalidated by this Court. With respect to the Commerce Clause, Congress expressly found that gender-based violence substantially and directly affects interstate commerce by preventing a discrete group, women, from

participating fully in the day-to-day commerce of our nation. The legislative record reflects that gender-based violence denies women the opportunity to secure and maintain employment on an equal footing with men, exacting a heavy toll on the national economy and interstate commerce. Witness after witness testified that as a result of rape, sexual assault, or domestic abuse, she (or someone she knew) was fired from, forced to quit, or had abandoned her job. Violence against women and the threat of such violence, Congress also learned, robs women of the most basic attributes of commercial existence—the ability to go grocery shopping, patronize shopping malls and public accommodations, walk the streets, and use public transportation. Congress heard considerable testimony that gender-based violence likewise denies women the fundamental right to travel from state to state and to procure an education free from sexual assault.

In short, Congress reasonably determined that the singling out of women to bear the brunt of so many crimes of violence imposes an "artificial restriction on the market" that brings the problem within the federal ambit. As this Court long has recognized, Congress has power to remove obstructions to interstate commerce, whatever their source. In authorizing a civil cause of action for victims to vindicate their right to be free from violence motivated by gender animus, the statute continues, and is in keeping with, a venerable tradition of federal civil rights laws.

2. With respect to § 5 of the Fourteenth Amendment, Congress expressly found, and the record reflects, that widespread gender bias has led state criminal and civil legal systems to treat gender-based crimes of violence less seriously than other major crimes, denying victims the equal protection of the laws and the redress to which they are entitled. Congress found that state legal systems have institutionalized the historic prejudices against victims of rape or domestic violence by erecting formal and informal barriers to justice not encountered by victims of other serious crimes—barriers that many courts already have recognized violate the Equal Protection Clause.

The civil rights remedy is specifically designed to compensate for state violations of equal protection by putting directly into the hands of victims a legal tool that will enable *them* to secure the vindication and recompense too often denied them as a result of biased and unequal law enforcement in state legal systems.

The civil rights remedy was carefully crafted in the best spirit of cooperative federalism, undergoing many revisions on a bipartisan basis for the very purpose of minimizing the invasion into state prerogatives. Congress provided a civil remedy for victims that supplements, but does not displace, available state remedies, and one that minimally interferes with state sovereignty. Once Congress, after undertaking a careful investigation into a national problem of the first order, makes specific findings supporting the exercise of federal power and the congressional choice of remedy, its judgment is entitled to substantial deference.

ARGUMENT

I. THE CIVIL RIGHTS REMEDY IS A VALID EXERCISE OF CONGRESS' AUTHORITY UNDER THE COMMERCE CLAUSE.

The court of appeals acknowledged that "[t]he legislative record in this case, considered as a whole, shows that violence against women is a sobering problem and also that such violence ultimately does take a toll on the national economy." Pet. App. 68a. The court also agreed that "Congress' specific findings regarding the relationship between gender-motivated violence and interstate commerce . . . depict the manner in which such violence affects interstate commerce." *Id.* at 68a-69a. This recognition by the court of appeals should have ended the matter—but it did not.

Instead, the Fourth Circuit ruled that § 13981 fails under the Commerce Clause for two reasons. The court concluded first, that like the Gun-Free School Zones Act struck down in *United States v. Lopez*, 514 U.S. 549 (1995), the nexus to interstate commerce of the regulated activity (here, gender-based violence) is too attenuated, and second, that § 13981 fails to heed

principles of federalism. *Id.* at 31a-51a.

Neither of these conclusions is correct. As detailed below, § 13981 stands on firmer Commerce Clause ground, and is drafted in a manner more mindful of federalism concerns, than the statute invalidated in *Lopez*.

A. Congress Made Express Findings, Based on a Sufficient Record, That Gender-Based Violence Substantially Affects Interstate Commerce.

The Fourth Circuit claimed that it could "discern no . . . distinct nexus between violence motivated by gender animus and interstate commerce." Pet. App. 34a. Instead, the court accused the defenders of § 13981 of relying on an attenuated "costs of violent crime" rationale on a par with the one offered in *Lopez*. Because it failed to appreciate the differences between this case and *Lopez*, the court of appeals refused to give Congress' specific and detailed findings—which were predicated on an exhaustive supporting record—the proper deference they are due.

1. We have no quarrel with this Court's view in *Lopez* that congressional findings are important for courts "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce," especially where, as was the case in *Lopez*, the connection between the activity and interstate commerce is not "visible to the naked eye." *Lopez*, 514 U.S. at 563. This Court invalidated the statute in *Lopez* in part because of Congress' failure to make the case for regulating gun possession near schools, conduct that in the Court's view, was neither economic in nature nor likely to exert a substantial effect on interstate commerce. *Id.* at 567. The same simply cannot be said of the Violence Against Women Act civil rights remedy. In sharp contrast to the Gun-Free School Zones Act, where Congress made no findings and the effect of the criminalized conduct on interstate commerce was comparatively trivial, § 13981 was the subject of numerous hearings and extensive findings by a Congress cognizant of the limits of its powers.

a. First, Congress explicitly found that gender-motivated violence against women substantially affects interstate

commerce. As the Conference Report stated:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products . . . .

H.R. Conf. Rep. 385.[6] Similar findings were made in Senate Judiciary Committee reports. The Committee found:

> Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full [participation] in the national economy.

1993 S. Rep. 54; *accord* 1991 S. Rep. 53; S. Rep. No. 101-545, at 43 (1990) ("1990 S. Rep.").

Second, while the Supreme Court in *Lopez* concluded that the relationship between gun possession near schools and interstate commerce was unduly attenuated, *Lopez*, 514 U.S. at 564-67, the connection between gender-based violence and interstate commerce is direct and confirmed by an ample legislative record. Congress heard testimony from dozens of

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[6] These findings were originally intended for the text of the statute, *see* S. 11, § 302(a), 103d Cong. (1993); 1993 S. Rep. 29, but were ultimately removed from the text to avoid cluttering the U.S. Code. Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 Wis. Women's L.J. 1, 36 (1996) (discussing the statute's legislative history).

victims and experts regarding the devastating impact of gender-based violence on the ability of women to participate in economic activities on an equal footing with men.

Congress determined that gender-based violence denies women an equal opportunity to compete in the job market, imposing a heavy burden on the national economy and interstate commerce. Witness after witness testified that as a result of rape, sexual assault, or domestic abuse, she (or someone she knew) was fired from, forced to quit, or had abandoned her job.[7] The Senate Judiciary Committee recognized "that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime." 1993 S. Rep. 54. Those women who remain employed still face a period of decreased productivity, 1990 S. Rep. 33, with many missing work because they "either cannot leave their homes or are afraid to show the physical effects of the violence." *Id.* at 37. As a therapist at Polaroid Corp. testified, the battered women in his company's support group "identified a clear relationship between spousal abuse and such bottom-line issues as tardiness, poor job performance, increased medical claims, interpersonal conflicts in the workplace, depression, stress, and substance abuse." Feb. 1993 S. Hrg. 16 (James Hardeman).[8]

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[7] *See, e.g.*, 1994 H.R. Hrg. 15 (Pegi Shriver) (abusive husband caused her to lose her job); Nov. 1993 S. Hrg. 31 (Karen Gigey) (abusive husband caused her to lose job by hounding her at work); *id.* at 14 (Lisa) (after baby was born, husband did not allow her to go back to work); 1991 S. Hrg. 132-33 (Amy Kaylor) (rape led to her losing her job because of time missed from work); *id.* at 292-93 (letter from Dawn Bosshard) (employer fired her after she took medical leave following gang rape); 1990 S. Hrg., Pt. 1, at 27 (Marla Hanson) (sexual assault ended her modeling career); 139 Cong. Rec. 31,291 (1993) (Rep. Olver) (describing letter from victim of abuse who could not hold a job because of husband's harassment at work).

[8] The National Federation of Business and Professional Women, Inc. likewise testified: "Women who either cannot leave their homes or are afraid to show the physical effects of the violence will either forego employment opportunities available or jeopardize their current employment by absenteeism and poor work performance." 1991 S. Hrg. 241; *see, e.g.*, 1994 H.R. Hrg. 17 (Karla M. Digirolamo) (recounting how she "began missing more and more work"

As a result of such interference with the ability of women to work, domestic violence was estimated to cost employers between $3 and $5 billion annually as a result of absenteeism in the workplace.[9] Even the *threat* of gender-based violence, Congress found, adversely affects interstate commerce by deterring women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence. 1993 S. Rep. 54.[10] For all of these reasons, "[i]n pure economic terms, the sheer loss of productivity attributable to violent gender-based assault is staggering." 1991 S. Hrg. 95 (Prof. Burt Neuborne).

The evidence before Congress illustrates countless other ways in which gender-based violence obstructs women's participation in economic life and their ability to move and travel freely. Congress heard from women who saw the most basic privileges of commercial existence—the ability to go grocery shopping, frequent shopping malls, walk the streets, and even mail correspondence—severely restricted by gender-based

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because her husband "kept [her] home or [she] was unable to leave because of the visible injuries [she] had sustained").

[9] 1991 S. Hrg. 240 (National Federation of Business and Professional Women, Inc.); *see also* 1994 H.R. Hrg. 9 (Vicki Coffey, Executive Director, Chicago Abused Women Coalition) ("Businesses lose billions of dollars annually due to absenteeism and loss of productivity because employees are abused.").

[10] *See* 1991 S. Hrg. 86 (Prof. Burt Neuborne) ("[W]omen who do enter the work force tend to choose their jobs with one eye looking over their shoulder about their safety. They can't work late like men can work; they can't work overtime; they can't take jobs in localities that are considered to be dangerous. Their employment opportunities have a ceiling placed upon them that you don't read in title VII."); *id.* at 92; *id.* at 240-41 (National Federation of Business and Professional Women, Inc.) ("Deprived of the ability to be safe in their own homes, to walk freely on the streets, and to travel alone without fear of attac[k], women find their employment options in life sharply reduced."); *see, e.g.*, 1990 S. Hrg., Pt. 1, at 22-23 (Nancy Ziegenmeyer) (rape victim gave up plans of becoming a real estate agent because "[t]he prospect of going into an unoccupied building with a stranger is terrifying to me" and now fears traveling and staying in lodging away from home).

violence.[11] Violence against women and the threat of such violence significantly impair women's freedom of movement and economic opportunities by deterring them from using public accommodations, sidewalks, streets, parking lots, and transportation—the very channels and instrumentalities of interstate commerce.[12] Congress found that because "fear of rape is central to the day-to-day concerns of about a third of women," it "takes a substantial toll on the lives of all women, in lost work, social, an[d] even leisure opportunities." 1991 S. Rep. 38.

As the legislative record also reflects, gender-based violence frequently denies women the basic right to travel from state to state, as spouses or boyfriends hunt them down or drive them from one jurisdiction to the next. One after another, witnesses described to Congress how they had become the interstate victims of abusive husbands or boyfriends who dragged the women from state to state to avoid detection of their crimes, or how the women themselves had fled across state lines to escape

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[11] *See, e.g.*, 1994 H.R. Hrg. 17 (Karla M. Digirolamo) (husband deprived her of money, forcing her to beg for food and money); Feb. 1993 S. Hrg. 15 (James Hardeman) (telling story of woman severely beaten on steps of post office because she had failed to get her husband's permission to leave the house and mail a letter); 1992 H.R. Hrg. 57 (Jane Doe) (husband allowed her "only to go to [her] job and come home and nowhere else"); 139 Cong. Rec. 31,292 (1993) (Rep. Olver) (submitting letter from abused woman prohibited by husband from going places, even grocery stores).

[12] "The threat of violence has made many women understandably afraid to walk our streets or use public transportation." 1990 S. Hrg., Pt. 2, at 80 (International Union, United Automobile, Aerospace & Agricultural Implement Workers of America—UAW); 1990 S. Hrg., Pt. 1, at 57 (Helen R. Neuborne, Executive Director, NOW Legal Defense and Education Fund) (describing self-imposed restrictions by female law school students who "routinely take precautions to protect themselves from the omnipresent threat of sex-based violence"). Women know that they cannot frequent places men can go without fear of attack. "Campuses, parking lots, libraries, shopping centers, parks, jogging trails—all are possible danger zones." 1991 S. Hrg. 253 (Dr. Leslie R. Wolfe, Executive Director, Center for Women Policy Studies); *see, e.g.*, Nov. 1993 S. Hrg. 41 (Jennifer Tescher) (after rape, could not bring herself to go out in public after dark).

their batterers.[13]

Finally, Congress learned that "[i]t is not unusual for a college woman victimized by rape, to drop out of school altogether. And, even if a woman does not drop out, she may feel it necessary to interrupt her college career simply to avoid her attacker." 1991 S. Hrg. 243 (National Federation of Business and Professional Women, Inc.). Indeed, the legislative record is replete with instances where abusive husbands prevented their wives from securing an education, or where, as is alleged here, a violent sexual assault impelled the victim to quit or transfer schools.[14] Brzonkala's own experience epitomizes the evidence before Congress—that gender-based violence causes women like Brzonkala to leave school, abandon jobs, or cease patronizing certain businesses and forms of public transportation. *See* Staff of Senate Comm. on Judiciary, *Violence Against Women: A Week in the Life of America* 9 (Oct. 1992) ("Violence against women affects everyday lives, imperils jobs, infects the workplace, ruins leisure time and educational opportunities.").

In short, the legislative record demonstrates all too clearly that gender-based violence "permeates every aspect of women's lives. It alters where women live, work, and study, as they try to be safe by staying within certain prescribed bounds," 1991 S.

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[13] *See, e.g.*, 1994 H.R. Hrg. 15 (Karla M. Digirolamo) (fled with child out of state); Apr. 1993 S. Hrg. 75 (Dr. John Nelson) (telling story of abused woman who had fled across seven states with her eighteen-month-old child when her husband tracked her down and shot the child in the head, killing him); 1992 H.R. Hrg. 55 (Jane Doe) (battered in four different states and seven different cities); 1990 S. Labor Hrg. 32 (Sarah M. Buel) (fled from New York to New Hampshire, and after husband hunted her down, moved virtually every year of son's fifteen years of life).

[14] *See, e.g.*, Nov. 1993 S. Hrg. 41 (Jennifer Tescher) (lost interest in school after rape in sorority house); 1991 S. Hrg. 132-33 (Amy Kaylor) (after rape, dropped out of school for a quarter and ultimately lost the funding for her college education); 1990 S. Hrg., Pt. 2, at 6 (Christine Shunk) (transferred schools after one rape, and flunked classes, delaying her graduation, after a second rape); 139 Cong. Rec. 31,291 (1993) (Rep. Olver) (describing letter from woman whose husband would not permit her to "get an education because he believed she would cheat on him or run away when she went to classes").

Hrg. 253 (Dr. Leslie R. Wolfe), relegating women to "a form of second-class citizenship." 1990 S. Hrg., Pt. 1, at 57 (Helen R. Neuborne). Thus, unlike the vague multi-step "cost of crime" rationale that this Court rejected in *Lopez*—where gun possession near a school might lead to violent crimes, which might adversely affect the learning environment, which might lead to a less productive citizenry, and which, finally, might have an adverse effect on the national economy—the connection between gender-based violence and interstate commerce is substantial and direct.

2. The court of appeals failed to appreciate, however, that the question is not whether it was satisfied that gender-based violence exerts these effects on interstate commerce, but instead, whether Congress' legislative judgment that it does, was rational, as it surely was. *See Lopez*, 514 U.S. at 563 (Court evaluates "the legislative judgment" that a particular activity substantially affected interstate commerce). This Court reaffirmed in *Lopez* that federal statutes enacted pursuant to the Commerce Clause remain subject to rational basis review. *Id.* at 557; *see also id.* at 568 (Kennedy, J., concurring) (counseling reviewing courts to exercise "great restraint"). Accordingly, a "court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is *any rational basis* for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) (emphasis added); *accord Preseault v. ICC*, 494 U.S. 1, 17 (1990).

Nowhere has this Court been more sensitive to Congress' discretion in exercising its broad Commerce Clause authority than when, as here, Congress has determined that a particular class of conduct obstructs a discrete group's participation in commercial intercourse and thus warrants a federal response. In *Katzenbach v. McClung*, 379 U.S. 294 (1964), for example, the Court sustained the application of Title II of the Civil Rights Act of 1964 to Ollie's Barbecue, a family-owned restaurant in Birmingham, Alabama, which served a local clientele. The Court relied on evidence before Congress establishing that race discrimination in restaurants had "a direct and highly restrictive effect" upon interstate travel and hindered interstate commerce

by affecting the volume of interstate goods sold and the success of local businesses. *Id.* at 300. Because Congress could find that racial bias by restaurants adversely affected commerce, the Court rejected the argument that Congress was required to include a provision compelling a case-by-case determination of the impact on interstate commerce. *Id.* at 303; *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

Likewise, in upholding the extension of the Age Discrimination in Employment Act to state employers, this Court relied on the damaging economic impact of age discrimination, which "deprived the national economy of the productive labor of millions of individuals" and "inflicted on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations." *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983). As the Court had put it in *McClung*: "this type of discrimination imposed 'an artificial restriction on the market' and interfered with the flow of merchandise." 379 U.S. at 299-300; *see also Daniel v. Paul*, 395 U.S. 298, 307 n.10 (1969) (recognizing that if "establishments narrow their potential markets by artificially restricting their patrons to non-Negroes, the volume of sales and, therefore, the volume of interstate purchases will be less") (citation omitted).

The same holds equally true for gender-based violence. As documented above, Congress found that such violence likewise "deprive[s] the national economy of the productive labor of millions" of women and inflicts on women severe and dislocating "economic injury" because of the loss of opportunity for women to engage fully in the activities that are the lifeblood of our national economy. The singling out of *women* to bear the brunt of so many crimes of violence imposes an "artificial restriction on the market" as serious as that presented by race discrimination in public accommodations and one that merits an equally serious federal response. *See* 1991 S. Hrg. 116 (Prof. Cass Sunstein) ("Congress could reasonably find . . . that the existence of sex-related violence 'overhangs the market,' in the sense that it discourages women from working in jobs and travelling to places

in which sex-related violence occurs."); *see Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) (recognizing that Congress can regulate on the assumption that "we have a single market and a unified purpose to build a stable national economy").

Once Congress, after undertaking a careful investigation into a national problem of the highest order, makes specific findings justifying the exercise of its authority under the Commerce Clause, Congress' duty is discharged, its task complete, and its action entitled to a strong presumption of constitutionality.

B. Congress Deliberately Selected a Remedy That Respects Principles of Federalism.

This Court struck down the legislation in *Lopez* not only because of a perceived weakness in the link between gun possession near a school and commerce, but also because of concerns about the statute's intrusion into state prerogatives. Section 13981, by contrast, was narrowly drafted with the specific goals of minimizing any such invasion and maximizing cooperation between the federal and state governments in their fight against gender-based violence.

First, although the court of appeals' majority repeatedly referred to the civil rights remedy as a statute which "criminalize[s]" conduct, *e.g.*, Pet. App. 125a, that characterization is plainly incorrect. Section 13981 is a civil rights statute that authorizes a civil cause of action; it is *not* a criminal statute. Whereas, in the Court's view, the Gun-Free School Zones Act blurred the lines of political accountability and upset the federal-state balance by duplicating the criminal laws of more than 40 states barring the possession of firearms on or near school grounds, and by undermining innovative programs in many states designed to encourage the voluntary surrender of firearms, *id.* at 581-82 (Kennedy, J., concurring), § 13981 does no such thing. Unlike the gun possession statute, which added a "redundant layer of federal regulation in an area where most states had already acted," Pet. App. 276a (Motz, J., dissenting), § 13981 responds to the states' self-described needs without preempting or interfering with state prosecutions in any way. *See*

Part II, Section A(2), *infra* (describing state task force reports).

Equally important, in contrast to the Gun-Free School Zones Act, § 13981 does not invade any area of traditional state concern. In 1991, the federal and state judiciaries voiced concerns that the civil rights remedy would federalize domestic relations law and unduly burden both federal and state courts. *See* 1993 H.R. Hrg. 74-76 (1991 Report from the Judicial Conference of the United States); 1991 S. Hrg. 314-17 (Conference of Chief Justices); 138 Cong. Rec. 582, 583 (1992) (Chief Justice Rehnquist, 1991 Year End Report on the Federal Judiciary). Based on this same assumption that the provision would federalize many domestic disputes, the Administrative Office of the U.S. Courts predicted that the civil rights remedy would "significantly affect the courts and their administration" by generating as many as 53,800 civil tort cases annually, with a projected 13,450 annual case filings expected in the federal courts. 1991 S. Hrg. 15-16.

Congress responded to these concerns. In the spring of 1993, then-Chairman Biden and Senator Hatch took the lead in negotiating modifications to the civil rights remedy specifically to narrow its scope, preserve state spheres of authority, and minimize the statute's effect on domestic relations law. These bipartisan revisions were incorporated in the version of S. 11 reported favorably out of the Senate Judiciary Committee later that year. First, the Committee strove to preserve the states' voice in enforcing the new right to be free from gender-based violence by giving state courts concurrent jurisdiction to enforce the statute, § 13981(e)(3), and by barring the removal to federal court of any state court action asserting claims under § 13981. 28 U.S.C. § 1445(d); *compare* S. 11 (as introduced), *with* 1993 S. Rep. 30 (S. 11 as amended).

Second, the Committee carefully avoided supplanting state tort law by clarifying that to be "motivated by gender" within the meaning of the provision, a crime of violence not only had to be committed "because of gender or on the basis of gender," but it *also* had to be "due, at least in part, to an animus based on the victim's gender." § 13981(d)(1); *compare* S. 11 (as introduced),

with 1993 S. Rep. 30 (S. 11 as amended). Congress recognized that while women often are subject to violence for the same reasons as men (such as for robbery, burglary, larceny, and motor vehicle theft), "women also are victims of violence simply because they are women." 1991 S. Hrg. 262 (Dr. Leslie R. Wolfe). Accordingly, Congress drafted the statute specifically to target that gender bias; moreover, by enacting a civil rights statute that requires invidious discriminatory motivation, Congress also avoided creating "a general federal tort law." 1993 S. Rep. 51 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

Third, the Committee limited the statute so that it did not reach even all violent crimes motivated by gender animus. Only the most serious offenses, felonies, now qualify as a "crime of violence" under the statute. § 13981(d)(2)(A); *compare* S. 11 (as introduced), *with* 1993 S. Rep. 30 (S. 11 as amended). Finally and most importantly, the Committee narrowed the civil rights remedy so as to deny federal courts supplemental jurisdiction over state law claims "seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." 42 U.S.C. § 13981(e)(4); *see also* 1993 S. Rep. 51 (the civil rights remedy "does not involve the Federal courts in divorce cases or domestic relations disputes"); 1991 S. Rep. 48.[15] Senator Hatch, as well as Senator Biden, was satisfied that Congress had been sufficiently sensitive to the important role of the states in addressing gender-based violence and that the revised provision struck the right balance between federal and state authority. *See* 139 Cong. Rec. 30,107 (1993) (Sen. Hatch) ("Despite some misconceptions, this measure does not make every sexual assault or rape a Federal offense. Rather, it recognizes that there is a proper role for the Federal Government

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[15] Perversely, the Fourth Circuit took this exclusion of federal jurisdiction over state family law to imply that § 13981 *does* federalize state family law. Pet. App. 46a. It is difficult to see how § 13981 *arrogates* jurisdiction to the federal courts over family law matters when the statute explicitly precludes such jurisdiction.

in assisting the States in fighting violence against women.").

After these significant changes were made to the civil rights remedy narrowing its reach, the Judicial Conference dropped its opposition. 1993 H.R. Hrg. 70-71 (Letter from Judge Stanley Marcus, Chairman, Ad Hoc Committee on Gender-Based Violence). State officials, moreover, far from worrying about any supposed federal intrusion into state affairs, actively *urged* Congress to pass the Violence Against Women Act, including its civil rights remedy.[16] Likewise, 33 Attorneys General have asked this Court to uphold the civil rights remedy because they "agree with Congress that gender-based violence substantially affects interstate commerce and the States cannot address this problem adequately by themselves." Amicus Brief of the States of Arizona, et. al. in Support of the Petition for a Writ of Certiorari, at 1. Significantly, the judiciary's concern about the potential impact of the statute on federal and state court case loads has not come to fruition. Although the precise number of cases filed is not known, there have been far fewer than one hundred reported cases asserting claims under § 13981 in federal court, and only a handful of reported cases in state court, since the statute's enactment in 1994.

Nor does § 13981, as the court of appeals feared, presage a new era of federal regulation of all crime, all domestic relations, and the like. *See* Pet. App. 89a. The statute simply represents an exercise of Congress' established power to remove obstructions to interstate commerce, whatever their source. *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 32, 37 (1937). As the vast majority of states have agreed, the problem of gender-based violence is national and interstate in nature, and

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[16] *See* 1993 H.R. Hrg. 34-36 (Letter from 41 Attorneys General urging Congress to pass the Violence Against Women Act, including its civil rights remedy, because "the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds"); *id.* at 30-32 (National Association of Women Judges); 1991 S. Hrg. 37-38 (Resolution from the National Association of Attorneys General). *But see* 1993 H.R. Hrg. 77-84 (Conference of Chief Justices, expressing continued opposition to the civil rights remedy).

accordingly "transcend[s] the abilities of State law enforcement agencies." 1993 S. Rep. 62. When the states fail to solve a national problem with a substantial impact on interstate commerce, Congress is free and duty-bound to act.

II. THE CIVIL RIGHTS REMEDY IS A VALID EXERCISE OF CONGRESS' POWER TO ENFORCE THE FOURTEENTH AMENDMENT.

Congress also enacted § 13981 as a means of redressing formal and informal biases against the victims of gender-based violence that prevailed in state legal systems across the country. Congress' determination that such a remedy was appropriate to enforce the Fourteenth Amendment Equal Protection Clause is also entitled to great weight. As this Court recently reaffirmed: "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (citation omitted).

Much as it did in *Lopez* with respect to the Commerce Clause, this Court held in *Boerne* and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999), that Congress was without power to enforce the Fourteenth Amendment without building a sufficient legislative record to justify its action. In *Boerne*, the Court held that by reinstating a standard of review for free exercise of religion claims not required by the First Amendment, the Religious Freedom Restoration Act impermissibly attempted to "alter[] the meaning of the Free Exercise Clause." 521 U.S. at 519. The Court rejected the claim that the statute advanced the narrower and clearly legitimate aim of redressing laws that unconstitutionally discriminated against religious beliefs and practices because "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 530.

Similarly, in *Florida Prepaid*, the Court ruled that the Patent Remedy Act, which purported to abrogate the states' sovereign

immunity from claims of patent infringement, could not be construed to enforce the Due Process Clause because the Court found "little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation" in enacting the statute. 119 S. Ct. at 2208. Searching the record in vain for the "evil" or "wrong" that Congress intended to remedy, the Court found that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Id.* at 2207. In the absence of "evidence of massive or widespread violation of patent laws by the States," the Court concluded that Congress simply had "acted to head off [a] speculative harm." *Id.* at 2207-08.

By contrast, in enacting the Violence Against Women Act civil rights remedy Congress did much more—meeting the new challenges set for it by this Court's recent decisions. As described below, Congress identified and documented a "massive" and "widespread" pattern of equal protection violations by state actors, one that justified a federal response.

A. Congress Found Widespread Bias in State Legal Systems Against the Victims of Gender-Based Crimes, and Acted to Remedy That Bias.

Congress made specific findings justifying its enactment of § 13981 to enforce the Fourteenth Amendment. The Conference Report stated:

> State and Federal criminal laws do not . . . adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests; existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled . . . .

H.R. Conf. Rep. 385; *accord* 1993 S. Rep. 29 (same findings originally intended for the statutory text).

This considered congressional judgment, which the court of appeals dismissed out of hand as "legal boiler plate," Pet. App. 152a, was predicated on a considerable record documenting

systemic gender bias and self-described failures by the states to treat gender-based violent attacks with the same seriousness accorded other major crimes. As the evidence before Congress revealed, crimes against women traditionally have been perceived as anything *but* crime—"as a 'family' problem, as a 'private' matter, as sexual 'miscommunication.'" 1991 S. Rep. 37. Congress learned that state legal systems had remained captive to archaic, stereotyped notions of the "proper place" for women in the family and society—a legacy of the common-law "rule of thumb." Rooted in historic skepticism of the veracity and gravity of charges of rape, 1991 S. Rep. 44 (citing Lord Matthew Hale's 17th century jury instruction that rape is a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' ever so innocent"), official and institutionalized suspicion of victims of gender-based violence lives on, Congress determined, in the guise of formal and informal barriers to justice not braved by victims of other serious violent crimes. *Id.* at 44-48; 1993 S. Rep. 49-50, 55.

1. As Congress found when it enacted the Violence Against Women Act, many victims of rape and other sexual assaults enjoyed no legal recourse whatsoever under state law. For example, when the bill was first introduced in 1990, the majority of states either did not make marital rape a prosecutable offense or downgraded it by allowing the crime to be charged only when aggravating factors, not required in other cases of rape, were present. 1993 S. Rep. 47 & nn.42-44, 55; 1991 S. Rep. 45 & nn. 49-50. Even sexual assaults by former husbands or boyfriends were immunized in some states from prosecution. *Id.* at 45 n.50 (noting that some states had extended marital rape exemptions to "cohabitants and formerly married persons").

The marital rape exemption rests on "archaic notions about the consent and property rights incident to marriage" that "are simply unable to withstand even the slightest scrutiny." *New York v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984) (holding that the marital rape exemption violates the Equal Protection Clause). The premise of the exemption is that "a woman was the property of her husband and that the legal existence of the woman was

'incorporated and consolidated into that of the husband.'" *Id.* (citation omitted). This premise reflects nothing but gender bias in one of its worse forms, as this Court has recognized in other contexts.[17] "Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being." *Trammel v. United States*, 445 U.S. 40, 52 (1980) (rejecting an absolute privilege against adverse spousal testimony). For this reason, many—but not all—courts have invalidated their states' exemptions or "downgrades" for marital rape or sexual assault as in violation of the Equal Protection Clause.[18]

State interspousal tort immunity doctrines further perpetuated archaic gender-stereotypes about the intrinsic "unity" of husband and wife. The Senate Judiciary Committee found that these doctrines erected yet another formal barrier to legal vindication for the victims of gender-based violence, this time in state civil legal systems. 1993 S. Rep. 55; 1991 S. Rep. 45. When Congress was considering the Violence Against Women Act, interspousal tort immunity barred women in ten states from suing her spouse under state tort law after a brutal attack. *See* 1990 S. Hrg., Pt. 1, at 64 (NOW Legal Defense and Education Fund). Not surprisingly, these laws frequently met the

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[17] *See, e.g., United States v. Virginia*, 518 U.S. 515, 534 (1996) ("[C]lassifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.") (citation omitted); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (Court has rejected "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'" and other "archaic and overbroad" generalizations).

[18] *See, e.g., Merton v. Alabama*, 500 So.2d 1301, 1305 (Ala. Crim. App. 1986); *Williams v. Alabama*, 494 So.2d 819, 830 (Ala. Crim. App. 1986); *Warren v. Georgia*, 336 S.E.2d 221, 226 n.11 (Ga. 1985); *Illinois v. M.D.*, 595 N.E.2d 702, 713 (Ill. App. Ct. 1992); *Shunn v. Wyoming*, 742 P.2d 775, 778 (Wyo. 1987).

same fate as their criminal counterparts, with many courts declaring them to be in violation of the Equal Protection Clause.[19] Still other legal requirements unique to crimes of sexual violence conspired to prevent women from bringing their attackers to justice. *See* 1993 S. Rep. 45-46; 1991 S. Rep. 44-47.

That some states have reformed these laws does not mean that all states have done so. A victim hardly should be forced to wait and suffer flagrant violations of her constitutional rights until an appropriate case comes along to present a state court with an opportunity to strike down an offending law[20] or until her state legislature is motivated to act—assuming that such action is even effective.[21] And neither should Congress.

2. In concluding that "[w]omen often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination," 1993 S. Rep. 49, Congress relied, in part, on two dozen studies by state task forces on gender bias. *See id.* at 49 & n.52; 1991 S. Rep. 34, 43-44 & n.40. Congress found that "[s]tudy after study has concluded that crimes disproportionately

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[19] *See, e.g., Moran v. Beyer*, 734 F.2d 1245, 1248 (7th Cir. 1984) ("[W]e cannot find it at all rational to believe that the Illinois legislature's desire to protect marital harmony is fulfilled by [the statute], which does little more than grant one spouse almost unconditional license to make his marriage partner a sparring partner. We are, therefore, compelled to declare it unconstitutional."); *see also Jones v. Jones*, 376 S.E.2d 674, 675 (Ga. 1989); *Burns v. Burns*, 518 So.2d 1205, 1211 (Miss. 1988); *Estes v. Estes*, No. WD-84-36, 1984 WL 14313, at *4 (Ohio. App. Oct. 19, 1984); *Hack v. Hack*, 433 A.2d 859, 868 (Pa. 1981); *Price v. Price*, 732 S.W.2d 316, 320 (Tex. 1987).

[20] Ironically, because of the requirement of Article III standing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), court challenges to marital rape exemptions have been beyond the victim's control. The validity of these exemptions generally have reached the courts when a defendant who could not claim the benefit of a state marital exemption challenged the exemption as denying *him* equal protection. *See, e.g., Liberta*, 474 N.E.2d at 569.

[21] Regrettably, Congress found that even when state legislatures have acted, implementation of victims' new rights has faltered. 1991 S. Rep. 46 ("The sad fact is that law reform has failed to eradicate the stereotypes that drive the system to treat these crimes against women differently from other crimes.").

affecting women are often treated less seriously than comparable crimes against men." 1993 S. Rep. 49; *accord* 1991 S. Rep. 43. "[C]ollectively," Congress concluded, "these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims." 1993 S. Rep. 49 (citation omitted); 1991 S. Rep. 43-44. Indeed, many state task force reports candidly admitted that gender bias was pervasive in their state legal systems.[22]

Congress perceived that an important reason state remedies have failed is "because legal rules and practices continue to shine a spotlight of suspicion on the victim." 1991 S. Rep. 44. Because of this "pervasive suspicion of rape victims' credibility," 1993 S. Rep. 45 (footnote omitted), courts, prosecutors, and law enforcement officers frequently require additional corroboration of victims' testimony, such as physical injuries, a prompt complaint, no prior contact with the defendant, and polygraph exams. *Id.* at 45-46; 1991 S. Rep. 44-47.

And "[a]s if the credibility issues were not burdensome enough, survivors must also face pervasive victim-blaming attitudes." 1991 S. Rep. 47. The Committee pointed to "the widespread belief that people who are raped precipitate in some way, whether it be by dress having a drink in a bar, accepting a ride in a car or accepting a date." *Id.* (quoting 1991 S. Hrg. 136 (Gill Freeman)). This entrenched "boys will be boys" / "she must have asked for it" mentality, 1993 H.R. Hrg. 8 (Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund), is unique to gender-based violence. *See* Nov. 1993 S. Hrg. 48 (Julia Vigue, Rape Crisis Center) ("A double standard is very, very clear. Sex crime is the one area of criminality where we judge the offense not by the perpetrator but by the victim."). The notion that *women* cannot frequent bars,

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[22] *See, e.g.*, 1991 S. Hrg. 135 (Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Commission); Administrative Office of the California Courts Judicial Council, *Achieving Equal Justice for Women and Men in the Courts* 5 (1990); Supreme Court of Georgia, *Gender and Justice in the Courts* 1 (1991); Texas Gender Bias Task Force, *Final Report* 72 (1994).

accept a car ride or a date, or go out late at night without assuming the risk of a violent sexual assault, is gender bias, plain and simple. This assumption that the woman had precipitated or "asked for" the attack boded particularly poorly for the victims of "acquaintance rape," which, as Congress learned, state prosecutors routinely refused to prosecute. 1991 S. Rep. 47.[23]

As further evidence of "the puzzling persistence of public policies, laws, and attitudes that treat some crimes against women less seriously than other violent crimes," 1991 S. Rep. 33, witness after witness gave painful testimony regarding the unwillingness of too many state police officers, prosecutors, and even judges, to treat domestic abuse as the egregious crime that it is,[24] leading Congress to conclude that "[g]ender bias

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[23] *See, e.g.*, 1993 H.R. Hrg. 9 (Sally Goldfarb) (reporting that the Oakland, California police department closed over 200 rape cases with little to no investigation because they involved prostitutes and drug users, as well as acquaintance rapes); 1991 S. Hrg. 137 (Gill Freeman) (reporting that prosecutors in Florida are unwilling to pursue acquaintance rape cases).

[24] As one prosecutor observed, "Police work on domestic cases generally reflect[s] the officers' attitude toward these cases: That they are unimportant and that they will go nowhere." 1992 H.R. Hrg. 70 (Margaret Rosenbaum, Assistant State Attorney); *see, e.g.*, 1994 H.R. Hrg. 18 (Karla M. Digirolamo) (police came when husband was kicking her while pregnant and told them "to keep it down" and went on their way); *id.* at 119-20 (Donna Lawson) (bereaved mother recounts the refusal of police to respond to daughter's boyfriend's daily ritual of forcing her daughter's car off the road, until finally, he killed her); Nov. 1993 S. Hrg. 15 (Lisa) (after husband stabbed her in the back and drove down the road dragging her from his truck, police commented that it looked like a "push/shove match" had taken place and did nothing); Apr. 1993 S. Hrg. 12 (Loretta Baca) (police officer asked her why she was filing charges against boyfriend for assault, given that she was "a Hispanic female and that was part of [her] culture," and prosecutor decided that "the only reason" she was filing charges was because she was "mad" at the boyfriend and was "probably already talking to him and sleeping with him"); *id.* at 82 (Barbara Wood, Executive Director, Turning Point) (battered women often told by officers that they cannot arrest the husband because "he might lose his job and that wouldn't be fair"); 1992 H.R. Hrg. 33-35 (Vivian Downing) (husband who shot her in the neck, leaving her a quadriplegic, was never prosecuted); *id.* at 57-58 (Jane Doe) (when police finally responded to call, they told her that if she wanted to keep her children, she should return to the house and "work everything out");

contributes to the judicial system's failure to afford the protection of the law to victims of domestic violence." 1993 S. Rep. 46. Even civil protection orders, when domestic violence victims could obtain them, were of little use because of state officials' reluctance to enforce them.[25] Still others attested to the official predisposition to discredit, blame, or stereotype the victims of rape or sexual assault for their attacks.[26] The inaction in this case of Virginia Tech, a state entity, was unfortunately, all too typical.

1990 S. Labor Hrg. 6 (Mary Pat Brygger, National Woman Abuse Prevention Project) (study found that in 90% of domestic homicides, police had been called to the home at least once, and in more than 50% of the cases, five or more times); *id.* at 27 (Annette Stewart) (police responded to call and then left while husband was beating her up because husband told police they were only having a "domestic squabble"); *id. at* 77 (Barbara Zeek-Shaw, Project Safeguard) (judge berated a pregnant battered woman requesting a restraining order for "wasting the court's time" and told her she "should act more like an adult"; her husband subsequently beat, strangled, shot, and killed her).

[25] *See, e.g.*, Feb. 1993 S. Hrg. 31, 33 (Rep. Barbara Gray) (restraining orders not treated seriously); 1990 S. Labor Hrg. 28 (Annette Stewart) (police would not enforce her protection order); 1990 S. Hrg., Pt. 2, at 99 (Tracy Motuzick) (police refused to enforce restraining order against abusive husband, who ultimately stabbed her thirteen times and broke her neck, leaving her paralyzed); 139 Cong. Rec. 31,291-92 (1993) (Rep. Olver) (describing letter from victim who had received 13 restraining orders against her husband, who was not charged with over 200 counts of violating them).

[26] *See, e.g.*, 1993 S. Rep. 46 (citing Louisiana sheriff's response to scene in which an attacker had shoved a screwdriver three inches into the victim's stomach and raped her, that "the victim must have 'incited' or 'provoked' the attacker"); 1992 H.R. Hrg. 40 (Jennifer Katzoff) (in response to her reported rape, campus security told her that because she had opened the door and had not screamed, that she "had asked for it, and that it was [her] fault"); 1991 S. Hrg. 63 (Roland W. Burris, Attorney General of Illinois) (judge dismissed a rape charge because the victim said that the attack took place at 10 a.m. because he believed that no one would break into an apartment in the daylight, with the shades up, and risk being seen by neighbors); *id.* at 293 (letter from Dawn Bosshard) (state authorities told victim of gang rape that there was nothing they could do, and one official asked her, "Isn't it your fantasy to be raped by four guys!").

Given this "double victimization" of women—first at the hands of the attacker, and then, at the hands of the legal system—it should come as no surprise that, as Congress found, "[m]any of those crimes are never reported, fewer are prosecuted, and even fewer result in a conviction." 1990 S. Rep. 42; *see also* 1993 S. Rep. 42; 1993 H.R. Rep. 25-26. Victims fared no better in state civil justice systems. Although sexual assault is a tort in every state, one study found that only 255 civil jury trials in sexual assault cases had been conducted *over a ten-year period* and that fewer than one percent of all victims had collected compensatory damages. 1991 S. Rep. 44 & n.43.

3. As a result of the overwhelming evidence of bias in state legal systems, Congress was compelled to conclude: "From the initial report to the police through prosecution, trial, and sentencing, crimes against women are often treated differently and less seriously than other crimes." 1993 S. Rep. 42. Such institutionalized and sweeping disregard for victims of gender-based violence can hardly be dismissed as negligent or inadvertent. *See* Pet. App. 153a-155a. While a state may have no affirmative constitutional duty to protect its citizens absent some "special relationship," *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), a state "may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *Id.* at 197 n.3. It is clear that "[d]iscrimination in providing protection against private violence [can] violate the equal protection clause of the Fourteenth Amendment." *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982).

Thus, § 13981 "takes aim at gender-discrimination of the type for which the 14th amendment provides heightened scrutiny." 1993 S. Rep. 55. As Congress properly concluded, in no case does it have greater power to legislate to enforce the Fourteenth Amendment than when, as here, "the criminal justice system is not providing equal protection of the laws [to] women in the classic sense." *Id.* (citing 1991 S. Hrg. 105 (Prof. Cass Sunstein)); *see also* 1993 H.R. Hrg. 96 (James P. Turner, Acting Assistant Attorney General) (the legislative record demonstrates

"a classic denial of equal protection").

B. Congress' Choice of Remedy in Responding to the Failings of State Legal Systems Was Appropriate.

Finally, this Court has required legislation enforcing the Fourteenth Amendment to display "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Relying on *Boerne*, the Fourth Circuit denounced the civil rights remedy as both under- and over-inclusive and thus lacking in both "congruence" and "proportionality." Pet. App. 157a-160a. Congress is entitled to greater latitude than that allowed by the court of appeals.

Section 13981 is calibrated precisely to address the constitutional violation that Congress had identified—the states' systemic failure to afford victims of gender-based violence an opportunity to vindicate their rights on a par with other victims of serious violent crime. Indeed, § 13981 is the *only* provision in the Violence Against Women Act that directly empowers these victims. As Congress explained: the civil rights remedy "puts another legal tool in victim's hands to call their attacker to account. Testimony before the committee shows that such remedies are important because they allow survivors an opportunity for legal vindication that the survivor, not the State, controls." 1990 S. Rep. 42; *see also* 1993 H.R. Hrg. 3 (Sally Goldfarb); 1991 S. Hrg. 105 (Prof. Cass Sunstein); *id.* at 85-86 (Prof. Burt Neuborne).

Nonetheless, the court of appeals condemned the statute first, for not directly regulating the states themselves. Pet. App. 44a-45a, 157a. Yet Congress was not required, as the court suggested, to enact a far more sweeping and intrusive remedy for state failings, such as by preempting the states' criminal and tort laws altogether,[27] authorizing law suits directly against states or

[27] Congress deliberately struck a careful balance between directly preempting discriminatory state laws, such as the marital rape exemption, and indirectly codifying such bias. Thus, by design, § 13981 includes within its definition of "crime of violence" those acts that would constitute a federal or state felony *but for the relationship* between the perpetrator and the victim; in other words, if a man committed what, under state law, would amount to a "crime of violence" but for the fact that the victim was his wife, § 13981 would furnish a remedy. § 13981(d)(2)(B). For the same reasons, Congress ensured that the commission of a qualifying "crime of violence" under the statute did not turn on whether the crime *actually* had led to criminal charges, prosecution, or conviction, § 13981(d)(2)(A), because Congress intended to redress the unequal enforcement of such crimes in state legal systems, not validate it.

their officials, extending federal jurisdiction over family law matters, denying states concurrent jurisdiction over actions brought under § 13981, or by regulating *all* violence against women, regardless of the presence or absence of gender-based animus. *See* Pet. App. 44a-45a, 89a, 131a-132a. What the court of appeals saw as the statute's vice is actually its virtue: that Congress did none of these things underscores the care with which it crafted the civil rights remedy so as not to displace state laws or burden state functions. That Congress could have gone farther than it did, and taken action far more invasive to state sovereignty, is no reason to find the civil rights remedy void for lack of "congruence."[28]

To hold otherwise would be to force Congress to take action that it knew to be as impractical and unwise, as it would be punishing to the states. Congress had no intention of assuming control over all of family law so that it could address the specific problem of gender-based violence. Similarly, Congress is without power to require the states to enact new laws more to its liking. *See New York v. United States*, 505 U.S. 144 (1992). The Fourteenth Amendment does not limit Congress to creating

[28] *Cf. Preseault v. ICC*, 494 U.S. 1, 18-19 (1990) ("[W]e are not at liberty . . . to hold the [statute] invalid merely because more Draconian measures—such as a program of mandatory conversions or a prohibition of all abandonments—might advance more completely the [congressional] purpose."); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981) ("Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.").

undesirable or unrealistic causes of action directly against the states or their agents. Instead of penalizing the states, Congress adopted the private attorney general model, in which private individuals sue to vindicate their rights while, at the same time, motivating states to do a better job of protecting those rights. *See City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).

Section 13981's alleged overbreadth is also no constitutional defect. The court of appeals determined that the statute's remedy was "out of proportion" to any possible unconstitutional state action because it reaches all victims of gender-based crimes, all defendants who commit such crimes, and all states, without regard to the adequacy of their laws and enforcement efforts. Pet. App. 160a-161a. Yet it was reasonable for Congress to conclude that to require an individualized showing of state constitutional violations in each and every case would have imposed an undue—and likely impossible—burden of proof on the very victims whose access to the legal system Congress intended to ease, not restrict.

Such discretionary choices are in keeping with Congress' prophylactic power to effectuate the purposes of the Fourteenth Amendment. The remedy Congress selected corresponded to the nature of its findings: Congress found an across-the-board failure by states to provide equal protection to the victims of gender-based violence and responded by enacting an across-the-board remedy to permit those victims to bypass the state systems that too often had failed them.

CONCLUSION

As this Court recently recognized, "Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997). Proper respect for the prerogatives of Congress requires that this Court uphold the constitutionality of the Violence Against Women Act civil rights remedy. Accordingly, Senator Biden respectfully urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
NOV 12 1999
OFFICE OF THE CLERK

(13) (9)

Nos. 99-5, 99-29

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

V.

ANTONIO J. MORRISON, ET AL., RESPONDENTS

CHRISTY BRZONKALA, PETITIONER

V.

ANTONIO J. MORRISON, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

This case brings into play two of our basic constitutional commitments: first, to a federal system that both guarantees the States a major role and gives Congress broad responsibility over interstate commerce, and second, to a nationwide guarantee that all persons enjoy the equal protection of the laws. Amici, law professors (identified in an addendum below) who teach and write about constitutional law, the federal courts or jurisprudence, will discuss how the Violence Against Women Act (VAWA) civil rights remedy is an apt response to the combined demands of these constitutional commitments.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1994, Congress enacted VAWA, a multi-faceted statute responding to the inequality that women victims of violence encounter in state justice systems and to the economic injuries that this violence creates. The statute provides funding to the states for criminal law enforcement against perpetrators of violence, and for a variety of other assistance. *See generally* 42 U.S.C. §§13931-14040. The provision at issue here, Section 13981, creates a new federal civil rights remedy for victims of violence resulting from "animus based on the victim's gender."

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[1] Consent has been given by the four parties to amici to file this brief. In accord with Rule 37.6, no counsel for a party has authored the brief in whole or in part nor has any one but amici and their counsel funded its preparation and submission.

Unlike recent legislation invalidated by this Court, the new civil rights remedy was enacted after four years of deliberate congressional consideration of the ways violence against women implicated two of Congress' basic constitutional responsibilities: to protect interstate commerce and guarantee equal protection. Much of the evidence came from state officials, and specifically state judiciaries, which reported that state and local police, prosecutors and judges were not yet providing equal protection for women. Congress responded with substantial funding resources for the states, but concluded that a supplemental civil rights remedy was also necessary. This provision was drafted and redrafted to respond to concerns of both state and federal judges that state courts remain the adjudicators of domestic relations law. Congress narrowed the statutory cause of action to the most serious offenses, prohibited supplemental jurisdiction over any state law claims involving divorce, alimony or child custody, and denied removal of state claims. *See* 42 U.S.C § 13981(d), (e)(1), (4); 28 U.S.C. § 1445 (d).

Creation of this civil rights remedy is well within Congress' powers under the Commerce Clause and the Fourteenth Amendment. It is respectful of the federalism principles articulated by this Court in *United States v. Lopez*, 514 U.S. 549 (1995) and *City of Boerne v. Flores*, 521 U.S. 507 (1997). It is consistent with long-established constitutional allocations of powers to the federal courts and the Congress. It should be upheld.

I. The national government has power, under the Commerce Clause, to protect interstate and foreign commerce from injurious obstructions, whatever their source, so long as the regulated activities "substantially affect" commerce. *Lopez*, 514 U.S. at 559; *see NLRB v. Jones & Laughlin Steel Corp.*,

301 U.S. 1, 37 (1937). Since the 1960s, this Court and the Congress have recognized the need to protect the national economy from the injurious effects of discrimination that disable members of historically subordinated groups from participating fully in national economic life. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Congress called on this power to enact VAWA.

Through its many hearings, Congress identified specific harms to interstate commerce that amply satisfied the *Lopez* requirement of a "substantial effect" on interstate commerce. Extensive evidence from business organizations, mental health professionals and individuals made plain that the special hazards of violence faced by women limited their choices, affecting the jobs women took, and the times, hours, and places they worked. Violence against women harmed the national economy in terms of workplace productivity, the dollars lost to absenteeism, and health care costs. The record fully supports the conclusion that violence against women "restricts movement [and] reduces employment opportunities."[2]

Unlike the statute in *Lopez*, VAWA's civil remedy is based on a well-identified and substantiated need to protect commerce from the injurious effects of an environment of violence against a "quasi-suspect" class of persons, women, long treated by law and still treated by many as less than fully deserving of participation in economic life. Congress' approach is limited; it made no claim to general police powers nor did it "federalize" criminal or tortious acts based on some speculative and remote economic impact.

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[2] S. Rep. No. 103-138, 54-55 (1993).

In reviewing the extensive factual basis established for congressional action, the Court must take care not to initiate a new era of judicial second-guessing of matters properly for the legislature. Such an enterprise has no limits or boundaries. Rather than embark on a boundless oversight role, this Court should respect Congress' decision to protect the Nation's economy from injuries that spring from gender-based threats of violence.

II. Congress' extensive record demonstrates that state criminal justice systems deny women equal protection of the laws in the most fundamental sense: States fail to treat violent assaults against women as seriously as they treat violent assaults against men. Until recently, states regulated rape and domestic violence in explicitly sex-based terms; and Congress learned that this understanding of rape and domestic violence as assaults on women remains pervasive. Numerous witnesses and studies commissioned by the state judiciaries reported that official responses to violence continue to be shaped by stereotypical thinking. From the initial report to the police through prosecution, trial and sentencing, state actors take crimes against women less seriously than other crimes. This differential treatment violates the core command of the Equal Protection Clause: that women are entitled to the same protection from assault as men enjoy.

In creating VAWA's civil rights remedy, the Congress sought to enforce -- not to revise -- the core guarantees of the Equal Protection Clause. The exercise of this enforcement power raises none of the concerns addressed in *City of Boerne v. Flores*. The basic purpose of the Court's proportionality test was to prohibit pretextual uses of the enforcement power. Where there is no evidence of pretext, Congress's remedial powers under the Fourteenth

Amendment are broad and Congress is entitled to "wide latitude" to design effective remedies. *See Boerne*, 521 U.S. at 520.

Congress' decision to create a civil remedy is consistent with its larger purpose in enacting VAWA: to work in partnership with the States to eradicate historic forms of bias against women. Creating new damage or injunctive remedies against the states or their officers might have discouraged federal-state cooperation and interfered with the everyday administration of criminal justice. By contrast, VAWA's narrowly crafted civil remedy encourages state and local governments to work with victims of gender motivated violence, leaving states as the primary guarantors of protection of their citizens from violent assaults.

ARGUMENT

I. VAWA IS AN APPROPRIATE EXERCISE OF THE COMMERCE CLAUSE POWER TO PROTECT THE NATION'S ECONOMY FROM INJURIES RESULTING FROM VIOLENCE DIRECTED AT WOMEN.

This Court recognizes that Congress does not have a general police power. It cannot regulate simply because of a remote or slight relationship between a local activity and the national economy. *United States v. Lopez*, 514 U.S. 549 (1995). But Congress can fully protect interstate and foreign commerce from injurious obstructions as long as the regulated activities have a substantial effect on commerce. In its "watershed case"[3] of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), this Court concluded that Congress' Commerce Clause "power is plenary and may be

[3] *United States v. Lopez*, 514 U.S. 549, 555 (1995).

exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'" *Jones & Laughlin*, 301 U.S. at 37 (citing *Second Employers' Liability Cases*, 223 U.S. 1, 51). Acting under this authority, Congress has long protected the Nation's economy from the injurious effects of discrimination against racial minorities and women.

A. The Commerce Clause Empowers Congress To Protect The Economy From Injuries Stemming from Discrimination.

By the 1960s, both the Congress and the Court came to understand that one "'source of the dangers which threaten'" commerce, *Jones & Laughlin*, 301 U.S. at 37, is discrimination. *See Heart of Atlanta Motel v. United States*, 379 U.S. at 257; *Katzenbach v. McClung*, 379 U.S. at 300-01. The Court did not uphold the challenged anti-discrimination laws because of the "insignificant" amounts of food purchased in interstate commerce, *McClung*, 379 U.S. at 300-01, but because systematic, invidious discrimination itself harms interstate commerce.[4] This same power provides ample constitutional foundation for the civil rights remedy of VAWA.

In affirming Congress' leading role in addressing such discriminatory barriers, the Court described the record before Congress as "replete with testimony of the burdens placed on interstate commerce by racial discrimination in

[4] As the Court noted, the "absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food [on which appellees had relied], given the evidence as to the effect of such practices on other aspects of commerce" was not crucial. *McClung*, 379 U.S. at 304-05.

restaurants," including lowered per capita spending by the victims of the discrimination, the effect of discrimination in discouraging travel, and the deterrence to professional and skilled people moving into areas where such practices occurred. *McClung*, 379 U.S. at 299-300. Likewise, *Heart of Atlanta Motel* upheld the statute because of the "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." 379 U.S. at 257. As the Court explained,

> "It was this burden which empowered Congress to enact appropriate legislation, and given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce . . .was also deemed a social and moral wrong." *Id.*

This history, recognized in *Lopez*, confirms that Congress has the power to protect the national economy from the injurious effects of pervasive discrimination that blocks historically subordinated groups from equal participation in national economic life. This well-settled constitutional doctrine is now woven into the fabric of our national life and public commitments.

B. Congress Acted On A Compelling Record Showing Direct and Substantial Injuries to Commerce.

The evidence before Congress reflected a pattern of gender motivated violence that was part of a framework of law and practice discriminating against women persisting into the modern era.[5] In hearings around the country,

[5] For example, state laws prohibited women from entering particular

congressional committees learned how such violence prevents women from competing with men for jobs and income in the marketplace.

Several organizations presented data detailing the barriers. James Hardeman, a Manager in the Polaroid Corporation, described the workplace disruption and poor job performance caused by violence against female employees. He explained how the creation of workplace-based counseling groups responded to battering -- when violence against women stopped, women "secured better jobs" in the company.[6]

The President of the National Federation of Business and Professional Women (a bipartisan organization of 120,000 members) described the "enormous" "costs in lost employment opportunities" to women victims of violent assault:

> "Violent crimes committed against women employees directly impact their ability to perform at work, their absenteeism rates and the medical benefit costs to the employer. . . .[W]omen find their employment

professions, *see, e.g.*, *Goesart v. Cleary*, 335 U.S. 464 (1948) (upholding state law excluding women from bar-tending) and provided legal preferences to husbands over wives in various capacities, *see, e.g., Reed v. Reed*, 404 U.S. 71 (1971) (invalidating preference for male over female executors). For discussion of sex-based laws regulating sexual assaults, see *infra* at 18-23.

[6] *See Hearing on Domestic Violence: The Need to Concentrate the Fight Against an Escalating Blight of Violence Against Women, Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 16 (Feb. 1, 1993) (statement of James Hardeman, Manager, Counseling Department, Polaroid Corp.) [hereinafter *Senate Hearing 1993*]

> options in life sharply reduced."[7]

See also Senate Hearing 1993 at 241 (discussing constraints on women's employment because of fear of violence when using public transportation). The Federation also detailed the high rates at which raped women left their jobs, how men prevented women from leaving their homes to go to work, and how violence against college-aged women impaired their ability to pursue an education, thereby reducing their economic opportunities.[8]

[7] *Violence Against Women: Victims of the System, Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 239-41 (Apr. 9, 1991) (statement of Elizabeth Athanasakos, National President, National Federation of Business and Professional Women, Inc.) [hereinafter *Senate Hearing 1991*]

[8] Congress also received evidence that as many as 3-4 million women a year were victims of domestic violence, 137 Cong. Rec. H. 20, 29230 (1991) (Rep. McDermott), and that survey data showed that 9.3% of abused women reported taking time off from their jobs because of domestic violence. *See Senate Hearing 1991*, *supra* note 7, at 240 (statement of National Federation of Business and Professional Women). *See also* S. Rep. No. 102-197, at 53 (1991) (noting studies reporting that almost 50% of rape victims lose their jobs or must quit because of the severity of the crime).

Many victims of sexual assault reported difficulties in keeping or finding employment.[9] The Commission on the Status of Women of New York City reported that

> "The economy, and therefore everyone's standard of living are affected in numerous ways when women are the victims of violence. . .when women do not accept jobs because they fear the hours they would need to work would be too risky . . ."[10]

Congress learned of other adverse effects on the national economy. The National Federation of Business and Professional Women emphasized the substantial adverse effect of violence against female employees on small businesses.[11] Witnesses estimated that businesses lost $3-5 billion annually "due to absenteeism" and loss of productivity related to violence against women.[12] Physicians testified, for example, that at least 37% of female hospital

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[9] *See, e.g., Senate Hearing 1991*, supra note 7, at 131-33 (testimony of Amy Kaylor, from Toledo, Ohio); *Violence Against Women: Fighting the Fear, Examining the Rise of Violence Against Women in the State of Maine and Other Rural Areas, Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 13-17 (Nov. 12, 1993) (testimony of Lisa); *Violence Against Women, Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 55-58 (Feb. 6, 1992) (testimony of Jane Doe of New York City) [hereinafter *1992 House Subcomm. Hearing*].

[10] *1992 House Subcomm. Hearing, supra* note 9, at 116 (statement of New York City Commission on the Status of Women); *see id* at 117 (also noting harm to economy when women "cannot work because of possessive/abusive spouses, or they are limited to working in places where the spouse can maintain control or contact").

[11] *Senate Hearing 1991, supra* note 7 at 239-40.

[12] *See id.* at 240; *Women and Violence, Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 58 (Jun. 20, 1990) (statement of Helen R. Neuborne, Exec. Dir., NOW Legal Defense & Educ. Fund).

emergency room cases are due to abuse, and Representatives learned of the Surgeon General's conclusion that "battery is the single largest cause of injury among women."[13] Health care costs, by some estimates, were $5-10 billion per year.[14]

In sum, as the Senate Judiciary Committee reported, the prevalence of violence against women in the United States "restricts movement [and] reduces employment opportunities" for women. S. Rep. 103-138, at 54 (1993).[15] The conclusion Congress reached—that violence against women, directed at them as women, harms the national economy by preventing women's equal participation, *id*—is one that should come as no surprise to this Court, which has reviewed the harmful effects of gendered violence in a variety of settings.[16]

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[13] *See Violent Crimes Against Women: The Problems of Violence Against Women in Utah and Current Remedies, Hearing before the Senate Comm. on the Judiciary*, 103d Cong. 74 (Apr. 13, 1993) (statement of Dr. John Nelson, Deputy Director, Utah Dept of Health); *1992 House Subcomm. Hearing, supra* note 9 at 1 (statement of Rep. Schumer).

[14] Majority Staff Report, Senate Comm. On the Judiciary, 103d Cong., 1st sess., *The Response to Rape: Detours on the Road to Equal Justice* 14 (Comm. Print S. 103-147, 1993) (citing article in American Medical News).

[15] *See* H.R. Conf. Rep. No. 103-711, at 385 (1994) (violence against women "deter[s] potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business . . . in interstate commerce" with "substantial adverse effect on interstate commerce. . . diminishing national productivity [and] increasing medical and other costs").

[16] *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment in workplace); *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661 (1999) (assaultive behavior toward schoolgirl). In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court noticed the relationship between women's freedom from physical violence in the most intimate spheres of their lives and their ability to participate with

C. Upholding VAWA Will Open No Constitutional Floodgates Because, In Contrast to *Lopez*, Congress Sought To Advance A Traditional Federal Interest -- Freeing Commerce From Injuries Inflicted By Specific Patterns of Discriminatory Conduct.

Lopez does not question Congress' power to identify and respond to obstructions to commerce. The Gun Free School Zones Law invalidated in that case was the subject of a single hearing, at which constitutional questions about Congress' power were raised but not addressed. The government's brief did not suggest that Congress had actually considered the relationship between schoolyard violence and the national economy.[17] And the government defended the statute with a generic 'cost of crime rationale' that provided no way to delimit the range of permissible exercises of the federal commerce power over crime.

In contrast, when enacting VAWA, Congress undertook a serious effort at determining the economic effects of harms from discrimination, an area in which federal regulatory power is well-established. The legislative record leaves no doubt that Congress had a more than

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equality in the national economy, striking down a spousal notification provision in part because of its potential for violence. This Court explained that "for two decades of economic and social developments" people had made choices in reliance on the availability of abortion, and that women's "ability . . . to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 856.

[17] *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2239 & n. 255 (1998) (describing congressional record and Government's Brief in *Lopez*).

"rational" basis on which to conclude that violence against women had very substantial effects on interstate commerce. The detailed findings and extensive legislative record make more than plain to the "naked eye," *Lopez*, 514 U.S. at 563, the injurious effects to the national economy resulting from past failures to deter, prevent and penalize violence against women.

Unlike the broadreaching relationship between violence and the economy asserted in *Lopez*, VAWA addresses a circumscribed arena. The direct effects of violence against women on their participation in the national economy were thoroughly documented—grown women lost jobs, time from work, economic opportunities. By contrast, the link between gun possession near schools to the national economy seemed remote to this Court, built on a long chain of assumed events.

Upholding VAWA will not "open the floodgates" to an unlimited congressional power to federalize civil and criminal law. To date, counsel have identified only 51 cases with reported decisions in which plaintiffs asserted civil claims under VAWA, and of these 23 (or 45%) involve workplace (14/51), other commercial (2/51) or educational (7/51) settings.[18]

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[18] Cases involving workplace-related claims against employers or other employees include McCann v. Rosquist, 185 F.3d 1113 (10th Cir 1999); Henderson v. Heartland Press Inc., 1999 U.S. Dist. LEXIS 16466 (N. D. Iowa 1999); Grace v. Thomason Nissan, 1999 U.S. Dist. LEXIS 12711 (D. Ore. 1999); Whitaker v. Mercer County, 1999 U.S. Dist. LEXIS 14680 (D.N.J. 1999); Manikhi v. Mass. Transit Admin., 733 A.2d 372 (Md. Ct. Spec. App. 1999); Avila-Franco v. Worrell, 1998 U.S. Dist. LEXIS 12129 (D.D.C. 1998); Mattison v. Click Corp., 1998 WL 32597 (E.D. Pa. 1998); Randa Truong v. Smith, 28 F. Supp. 2d 626 (D. Colo. 1998); Braden v. Piggly Wiggly, 4 F. Supp. 2d 1357 (M.D. Ala. 1998);

Finley v. Higbee Co., 1998 U.S. Dist. LEXIS 21010 (N.D. Ohio 1998); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Newton v. Coca-Cola Bottling Co., 958 F. Supp. 248 (W.D.N.C. 1997); Crisonino v. New York City Housing Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Bell v. Cuyahoga Community College, 1998 Ohio App. LEXIS 3741 (Ohio Ct. App. 1998). Other commercial settings include Wesley v. Don Stein Buick, Inc., 985 F. Supp. 1288 (D. Kan. 1997) (claim by customer against salesman); Palazzolo v. Ruggiano, 993 F. Supp. 45 (D.R.I. 1998) (claim by patient against psychiatrist). Cases involving educational settings include this case and Gross v. Weber, 186 F. 3d 1089 (8th Cir. 1999) (claim by former student against former teacher); Doe v. Old Rochester Regional Sch. Dist., 56 F. Supp. 2d 114 (D. Mass. 1999) (claim by student against teacher); Liu v. Striouli, 36 F. Supp. 2d 452 (D.R.I. 1999) (claim by graduate student against professor/advisor); Ericson v. Syracuse Univ., 35 F. Supp. 2d 326, 45 F. Supp. 2d 344 (S.D.N.Y. 1999) (claim by student against coach); Thorpe v. Virginia State Univ., 6 F. Supp. 2d 507 (E.D. Va. 1998) (claim by student against student); B.F. v. Smith, 1998 Minn. App. LEXIS 300 (Minn. Ct. App. 1998) (same). Six cases involved claims against police, security or parole officers, *see e.g.*, Williams v. Bd. of County Commrs, 1999 U.S. Dist. LEXIS 13532 (D. Kan. 1999); Harris v. Zappan, 1999 U.S. Dist. LEXIS 8404 (E.D. Pa. 1999). One case involved claims against social acquaintances, *see* Doe v. Walker, 1999 U.S. App. LEXIS 24625 (1st Cir. 1999); one was by a parishioner against a minister, *see* Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997); one involved an alleged assault in a federal prison, *see* Thomasson v. United States, 1999 U.S. Dist LEXIS 13534 (D. Kan 1999); and one arose from an attack by a stranger, *see* Bridges v. City of Dallas, 1998 U.S. Dist LEXIS 8925 (N.D. Tex. 1998). Fourteen of the 51 cases involved claims against present or former spouses or boyfriends, *see, e.g.*, Kuhn v. Kuhn, 1999 U.S. Dist LEXIS 11010 (N.D. Ill. 1999) (spouse); Culberson v. Doan, 1999 WL 765970 (S.D. Ohio 1999) (boyfriend). (Four of the 51 cases did not have reported descriptions of the factual settings.)

Of course, assaults outside the workplace can also have a direct effect on the workplace, and the fact that violence occurs in family settings, as well as commercial, educational, prison, religious, and social settings, does not preclude federal jurisdiction. *Cf. Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992) ("domestic relations" exception to federal jurisdiction does not preclude tort action for assaults by father on children but applies only to divorce, child custody and alimony).

As the States' chief law enforcement officers recognized in urging Congress to enact VAWA,[19] the federal and the state governments have concurrent and complementary roles to play in this effort. Congress gave careful attention to federalism concerns in the lengthy drafting process, designing a civil cause of action that does not supplant any state remedies, and which limits the federal remedy to the most egregious instances of gender motivated violence. No state processes are reorganized by federal mandate. No state officials' time or tasks are commandeered. Establishing a federal remedy against perpetrators of gender-motivated violence is an appropriate means of removing barriers to the full and equal participation of women in the economic life of the nation.[20]

D. When Congress Deliberately Gathers Facts To Address A Problem Of National Import, The Court Must Be Careful Not To Intrude Lest It Violate The Separation of Powers.

Congress has the primary constitutional responsibility for developing appropriate responses to national economic problems. For most of our constitutional history, the Court

[19] *See Senate Hearings 1991, supra* note 7 at 37-38 (National Association of Attorneys General Resolution supporting enactment).

[20] The absence of a case-by-case inquiry into whether a particular act of gender motivated violence affects commerce cannot be fatal to the question of Congress' power here. For in *Katzenbach v. McClung*, a similar argument was made, that Congress should have provided for a case-by-case determination that "racial discrimination in a particular restaurant affects commerce." 379 U.S. at 303. The Court decisively rejected this contention. "Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. " *Id.* at 304.

has heeded the words of *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819), that "where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government . . . to inquire into the degree of [the law's necessity] would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[21] When Congress began to respond to the economic challenges of late 19th and early 20th centuries, the Court repeatedly overturned legislation, asserting categorical limits on the commerce power.[22] Judicial attempts to constrain congressional development of economic policy came to a close in the late 1930s and 1940s, as the Court came to defer to Congress' superior capacity to define and respond to a wide range of problems with a significant impact on the national economy.

In the last decade, the Court has increased its scrutiny of the basis for congressional action. Unsupported assertions of a national interest, *see Lopez*, 514 U.S. at 567, pretextual justifications to support action actually aimed at a goal outside of national power, *see Boerne*, 521 U.S. at 532, or de minimis examples of a potential problem not yet of serious national import, *see Florida Prepaid Postsecondary Ed. Exp. Bd. v. College Savings Bank*, 119 S. Ct 2199, 2210

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[21] *See also id* at 421 (Constitution gives Congress discretion to carry out its powers "in the manner most beneficial to the people.").

[22] *See, e.g., Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (invalidating federal law regulating movement of goods produced by child labor on ground that conditions of production were reserved to the states), overruled in *United States v. Darby*, 312 U.S. 100, 115-17 (1941); *Carter v. Carter Coal Co.*, 298 U.S. 238, 308-09 (1936) (invalidating Bituminous Coal Conservation Act on ground that only states could regulate terms of work in mines, notwithstanding the magnitude of coal strikes' effects on Nation's economy); for discussion, *see* BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §5.02-.04 (1999).

(1999), will not suffice. Requirements of substantiation, however, should not be translated into requirements that congressional "findings" mimic the judicial process. Rules of evidence do not and should not apply, nor should court-based burdens of proof arguments. Indeed, as Justice Kennedy, concurring in *Lopez* counseled, judicial review should be predicated upon "great restraint." *Lopez*, 514 U.S. at 568. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992)(Kennedy, J., concurring) (noting Congress' "power to define injuries and articulate chains of causation" for standing purposes).

A decision striking down VAWA would be wholly inconsistent with the Court's foundational jurisprudence on congressional power from 1937 forward. Were the Court to conclude that the evidence of direct and substantial effects on commerce was not sufficient in this case, a host of congressional statutes would be open to question. Indeed, challenges are already underway to a wide variety of federal statutes, including the Endangered Species Act, the Clean Water Act, CERCLA, the Child Support Recovery Act, and many others.[23]

What principles would guide this Court as it worked through the many statutes so challenged? How many witnesses, what kind of documentary material, and how long a hearing would suffice? The edifice of national power would be subject to repeated challenges as the Court reweighed the probative value of legislative investigations that form the predicate for congressional action.

But the Court should not and need not embark on

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[23] *See* Antony Barone Kolenc, *Commerce Clause Challenges After United States v Lopez*, 50 Fla. L. Rev. 867, 905-06, 914 (1998).

such an enterprise. The question under our Constitution is not what injuries to commerce the Court might find (nor, as to the Fourteenth Amendment, what remedies for constitutional discrimination the Court could give). The question is whether Congress had an adequate basis for acting under the Commerce Clause in creating the civil rights remedy in VAWA. As we have shown, the record before Congress was more than adequate to demonstrate that this is an arena in which Congress can lawfully act. To overturn this law, enacted with care and deliberation on this record, would indeed be to "pass the line which circumscribes the judicial department . . . to tread on legislative ground." *McCulloch v. Maryland*, 17 U.S. at 423.

II. THE VIOLENCE AGAINST WOMEN ACT IS AN APPROPRIATE EXERCISE OF CONGRESS' POWERS TO ENFORCE THE FOURTEENTH AMENDMENT.

A. Congress Found Pervasive and Entrenched Patterns of Sex Discrimination in State Criminal Justice Systems.

Congress enacted VAWA's civil rights remedy after years of hearings that documented widespread patterns of sex discrimination in state criminal justice systems. The evidence before Congress demonstrated that states deny women equal protection of the laws in the most fundamental sense: States fail to treat violent assaults against women as seriously as they treat other forms of violent assault. The pattern of sex discrimination Congress uncovered is pervasive, entrenched, and openly acknowledged by the state judiciaries themselves:

> "Study after study commissioned by the highest courts of the States . . . has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men. Collectively these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims."

S. Rep. No. 102-197, at 43-44 (1991) (internal quotations omitted) (citing Gender Bias Task Force Reports from 17 states); *accord* S. Rep. No. 103-138, at 49 (1993).

For centuries States have regulated rape and domestic violence as assaults against women, and this explicit understanding of the gender of the victims not only shaped how state actors regulated such assaults in the past. As Congress recognized, gender-based discrimination continues in the administration of the criminal law today.

Historically, States regulated domestic violence in explicitly sex-based terms:

> "Until the 20th century, our society effectively condoned family violence, following a common-law rule known as the 'rule of thumb,' which barred a husband from 'restraining a wife of her liberty by chastisement with a stick thicker than a man's thumb.'"[24]

Long after States formally repudiated a husband's common-

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[24] S. Rep. No. 103-138, at 41 (1993); *see generally* Reva B. Siegel, *'The Rule of Love': Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2123-25 (1996) (discussing treatises and cases recognizing the husband's common-law prerogative to "chastise" or "correct" his wife).

law prerogatives, law enforcement officials often refused to intervene when husbands beat their wives. Until quite recently, this denial of equal protection was announced in openly sex-based terms.[25]

Like domestic violence, rape is a form of assault that States have traditionally defined and punished in explicitly sex-based terms. Following the common law, they also allowed husbands to rape their wives with impunity. While most States have now repealed or revised the marital rape exemption, the record before Congress showed that, even after these reforms, many States still refuse to protect women from husbands who rape or assault them.[26]

In short, until quite recently, States often defined and regulated rape and domestic violence in overtly sex-based

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[25] *See* Siegel, *supra* note 24, at 2150-74. As late as 1975, the Oakland Police Department's *Training Bulletin on Techniques of Dispute Intervention* warned that "arrest will only aggravate the dispute or create a serious danger for the arresting officers . . . when a husband or father is arrested in his home." Del Martin, *Battered Wives* 93-94 (1976) (quoting Oakland Police Department's training bulletin). Congress could reasonably find that such discriminatory practices did not come to an end with the elimination of gender-specific language from police manuals. *See, e.g., 1992 House Subcomm. Hearing, supra* note 9, at 2 (statement of Rep. Charles Schumer) ("For hundreds of years, the legal system explicitly condoned violence against women. . . . . The rule of thumb now is that domestic violence cases are nothing but lovers' quarrels that are best left to be resolved without the police and the courts.").

[26] When the Congress first began to consider the problem of violence against women, it found that seven states did not define marital rape as a crime and 26 other states allowed prosecutions only under restricted circumstances. S. Rep. No. 102-197, at 45 n. 50 (1991)(citation omitted); this pattern persists today. *See* Jennifer Gaffney, *Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases*, 6 J. L. & Pol'y 247, 259 n. 51 (1997) (discussing current status of marital rape exemption).

terms; some States still do.[27] Even if a State revises its rape law in gender-neutral language, legislators, police, prosecutors, judges, assailants and victims still understand rape as a form of assault by men against women. As witnesses emphasized, gender norms that have organized the criminal justice system for centuries cannot be eliminated by fiat or transformed overnight. As the Congress recognized, State responses to assaults traditionally directed at women have been deeply infected by various forms of stereotypical reasoning:

> "If these cases had involved the typical male assault victim, our reactions might be far different. Typically, we do not ask whether the victim of a barroom brawl is a real victim; we do not comment that the victim deserved to be hit; we do not inquire whether there was resistance or whether the victim said "no" persistently enough; we do not believe that the crime may have been fabricated altogether. Until the stereotypes upon which these scenarios are built seem as foreign for the victims of rape and domestic violence as they do for the victims of barroom brawls, our criminal justice system will pose barriers for

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[27] With the rise of modern sex discrimination doctrine, states have generally rewritten their rape law in formally gender-neutral terms, yet many exceptions remain. *See, e.g.,* ALA. CODE § 13A-6-61(a), 13A-6-62 (a) (1999) (gender-specific definition of first- and second-degree rape); GA. CODE ANN. § 16-6-1(a) (1999) (gender-specific definitions of rape); IDAHO CODE § 18-6101 (1999) (gender-specific definition of rape); *see generally* MODEL PENAL CODE § 213. 1 (1) (1980) (originally adopted 1962; current through A.L.I. annual meeting, 1998 (WL 1999)) (defining rape as a crime committed by "[a] male who has sexual intercourse with a female not his wife").

> women it does not pose for others in our society."

S. Rep. No. 102-197 at 34 (1991).

Recent law reform efforts demonstrate just how difficult it is to alter the invidious gender-based attitudes and assumptions that have become institutionally entrenched under centuries of prior practice.[28] "The sad fact is that law reform has failed to eradicate the stereotypes that drive the system to treat these crimes against women differently from other crimes." S. Rep. No. 102-197, at 46 (1991). As the Senate Judiciary Committee concluded:

> "From the initial report to the police through prosecution, trial, and sentencing, crimes against women are often treated differently

[28] Numerous state gender bias task forces reported that invidious gender-based reasoning concerning violence against women lingers at every level of the State justice systems. *See, e.g., Report of the Illinois Task Force on Gender Bias in the Courts* 135 (1990) ("there continue to be problems in the following areas: . . . continuing police resistance in considering domestic violence a serious crime; . . . selective prosecution of domestic violence cases, accompanied by high rates of dismissal of these cases or reduction of the charges; . . . reluctance to impose prison sentences and the imposition of disproportionately low sentences in domestic violence cases. . . ."); *Utah Task Force on Gender and Justice* 60 (1990) ("Skeptical regard for the victim's credibility is a continuing problem in both [domestic violence and acquaintance rape] especially in interactions with law enforcement officers and prosecutors."); *Kentucky Task Force on Gender Fairness in the Courts* 28 (1992) ("Sex role stereotypes which blame the victim have played an important negative role in the lack of responsiveness in domestic abuse proceedings"); *Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System* 103 (1991) ("Police are reluctant to charge and prosecute cases of acquaintance rape and police do not charge a husband with the rape of his wife").

> and less seriously than other crimes. Police may refuse to take reports; prosecutors may encourage defendants to plead to minor offenses; judges may rule against victims on evidentiary matters; and juries too often focus on the behavior of the survivors-laying blame on the victims instead of on the attackers." S. Rep. No. 103-138, at 42 (1993).

B. Failure to Provide Women Equal Protection from Assault is a Core Violation of the Equal Protection Clause.

After years of hearings, Congress concluded that "bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H. R. Conf. Rep. No. 103-711, at 385 (1994). The detailed testimony gathered, as well as the numerous state task force reports examined in the legislative process, did not simply uncover a long history of explicitly sex-based regulation. It established that, even today, state actors responsible for protecting citizens against assault repeatedly engage in decision-making riddled with invidious stereotypical judgments about women.

These congressional hearings established an ongoing, pervasive, and deeply entrenched pattern of official state action that violated the core guarantee of the Fourteenth Amendment: that state governments afford equal protection of the laws to all persons, regardless of their race or gender. Blacks as well as whites, women as well as men, are entitled to protection by police, prosecutors, and the criminal justice system. Failure to provide such protection on equal terms is

a denial of equal protection of the laws in its most basic sense. This concern clearly motivated the framers of the Fourteenth Amendment, who feared that state governments would fail to protect freed slaves from crimes of violence perpetrated by private actors.[29]

Affording women equal protection of the laws means treating crimes of violence perpetrated against women as seriously as crimes against men.[30] Where state officials fail to do so because of archaic stereotypes about women's proper role in society, they violate the clearest command of the Equal Protection Clause.[31] As this Court has often recognized, official discrimination against women may take the form, not of overt hatred, but of outmoded and archaic views about women's roles and their relationships to men. *See, e.g., United States v. Virginia*, 518 U.S. 515, 532-34 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135-42 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (referring to Nation's "long and unfortunate history of sex discrimination. Traditionally, such

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29 *See* JACOBUS TENBROEK, EQUAL UNDER LAW 157-208 (1965).

30 The Equal Protection Clause guarantees persons equal protection of the laws in all spheres; state actions affecting persons in family relationships are no exception to this guarantee. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Frontiero v. Richardson*, 411 U.S. 677 (1973) ; *Orr v. Orr*, 440 U.S. 268 (1979); *see also* Jill Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297, 1335-53 (1998).

31 This is not a case concerning a gender-neutral law or policy that incidentally impacts women, but a case concerning a long history of sex-based reasoning in criminal and civil law enforcement that leads state actors to treat violence against women less seriously than violence against men. There is abundant evidence of discriminatory purpose within the meaning of *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); and *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 893, 898 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (striking down spousal notice requirement because it could provoke domestic violence, and perpetuate constitutionally offensive common-law assumptions about a husband's dominion over his wife).

C. The Civil Rights Remedy is Well Within Congress' Broad Power to Remedy Violations of the Fourteenth Amendment.

1. The Civil Rights Remedy is Not a Pretext for Independent Congressional Interpretation of the Constitution.

Congress has broad powers to enforce the Fourteenth Amendment, and may legislate to prevent and remedy violations of its terms. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). But the power to enforce the amendment does not entitle Congress to revise the Court's interpretation of its commands. Because "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), this Court evaluates legislation by asking whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. The test of proportionality is designed primarily to determine whether enforcement-clause legislation is actually crafted to remedy violations of constitutional rights. *Cf. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119

S.Ct. 2219, 2225 (1999)(noting that remedy must be genuine attempt to enforce constitutional rights). If the use of remedial power is not pretexual, Congress must be given "wide latitude" to decide how best to remedy constitutional violations. *Boerne*, 521 U.S. at 520.

This case raises very different issues from those confronted in *Boerne*. In that case, the Court saw Congress' use of remedial power as a pretext for revising the judiciary's interpretation of the Constitution's meaning.[32] In this case, there is no evidence of a similar congressional effort at substantive reinterpretation. As a consequence, this Court should give Congress "wide latitude" in determining the most appropriate methods of remedying systemic and continuing violations of the Fourteenth Amendment.

2. Congress Sought to Work in Partnership with the States in Remedying Constitutional Violations While Respecting the States' Primary Role in Criminal Law Enforcement, and Narrowly Tailored the Civil Rights Remedy to Achieve These Ends.

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[32] In *Boerne*, there was abundant evidence that members of Congress disagreed with the Court's decision in *Employment Div. v Smith*, 494 U.S. 872 (1990), and sought to pass the Religious Freedom Restoration Act (RFRA) to 'overrule' this decision by statute. *See Boerne*, 521 U.S. at 515-16. Nevertheless, before this Court, defenders of RFRA argued that Congress was only attempting to enforce *Smith* through prophylactic legislation. The Court found this characterization of Congress' purpose in enacting RFRA unpersuasive. The Court saw a clear lack of proportion between the sparse contemporary history of intentional religious discrimination in the United States and the "[s]weeping coverage" of RFRA. *Id.* at 532. Hence this Court saw RFRA as neither a genuine attempt at remedying constitutional violations as defined in *Smith* nor an appropriate means for achieving that end. The proportionality test introduced in *Boerne* thus functioned to distinguish pretextual uses of remedial power from genuine ones.

In enacting VAWA, Congress sought to work with the States as partners in remedying and preventing violence against women. State task forces across the nation had discovered pervasive gender bias in state and local law enforcement, and state officials looked to Congress for help in solving a national problem.[33] Congress responded, through VAWA, by authorizing $1.6 billion in funds, mostly to States, local governments and Indian tribes to pay for (a) rape prevention and education programs, (b) victim services programs, (c) improved security in public transit, (d) the construction and maintenance of battered women's shelters, and (e) funding for additional law enforcement to assist with prosecution of cases of violence against women.[34] The civil rights remedy was yet another element in this federal-state partnership. It is not an isolated intervention but part of a total nationwide program to support and supplement state and local law enforcement while respecting the primary role of state governments in protecting citizens from violent assault.

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[33] *See Crimes of Violence Motivated by Gender, Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm.on the Judiciary*, 103d Cong. 35 (Nov. 16, 1993) (letter from 41attorneys general) ("Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds."); *see also* S. Rep. 103-138 at 39 (describing hearing held during 102d Congress in which attorneys general of Illinois and Iowa "testified in support of a comprehensive Federal response to violence against women, particularly the need for a civil rights remedy"); *Senate Hearing 1991, supra* note 7 at 137 (Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Commission) ("The message I received from one law enforcement officer was: Please tell Congress we are drowning; we need help.").

[34] *See* CONGRESSIONAL QUARTERLY ALMANAC, 103d Cong., 2d sess, v. L, at 274 (1994); *see also* JOSEPH R. BIDEN, SAFER STREETS, SAFER HOMES 20, 29-37 (Sept. 1999) ($1.4 billion so far appropriated for VAWA programs).

Congress' decision to create a civil remedy is consistent with Congress' larger purpose in enacting VAWA: to work in partnership with the States to eradicate historic forms of bias against women in the criminal justice system. The new remedy vindicates the dignitary and material interests of victims of gender-motivated violence, and promotes a legal order in which all members are recognized as equally worthy of protection from assault. Yet, like the larger statute of which it is a part, the civil rights remedy furthers these equal protection values in a federalism-friendly fashion.

Given Congress' interest in working with the States, it is not surprising that it chose a civil action rather than permitting injunctive or monetary relief against state officials for discriminatory underprosecution. Such alternatives would have required state and local officials to defend their actions against charges of sex discrimination in federal court. Given its broad remedial discretion, Congress surely has power to conclude that suits against state officials would not promote a federal-state partnership conducive to reform. Moreover, unlike the legislation at issue in the *College Savings* cases, Congress did not create a right of action against states for damages. Instead, the funding provisions of VAWA sought to enhance the fiscal capacity of the states to prosecute violence against women.

For these reasons, Congress had ample authority to create a civil cause of action against the perpetrators of gender motivated violence. The VAWA civil rights remedy does not commandeer state officials. It does not drain the coffers of state law enforcement agencies, and it does not displace state government functions. This solution allows the federal government to take an important leadership role

while leaving the states with primary responsibility for protecting citizens from physical assault.[35]

3. The Civil Rights Remedy in VAWA Is National Because It Deals With a National Problem.

Congress did not attempt to limit VAWA to particular States and local governments with histories of underenforcement for two reasons. First, the record makes clear that the problem of underenforcement was national. A nationwide solution, like the nationwide suspension of literacy tests in *Oregon v. Mitchell,* "may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country." 400 U.S. 112, 284 (1970) (Stewart, J., concurring).

Second, Congress' desire to work with states rather than against them also explains its creation of a nationwide remedy. Had Congress attempted to single out individual states as especially culpable, it would have been more

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[35] Although the civil rights remedy as initially introduced would have applied to a broader range of violence against women, Congress took federalism values into account in deciding to limit the remedy to those cases of violence where plaintiffs could show that the violence was "due. . . to animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). Congress' decision to focus the civil remedy on the most openly biased forms of violence against women, rather than the full range of violent assault against women, represents a federalism-sensitive judgment about the circumstances in which it was most important to make federal fora available, and presents none of the pretext or separation-of-powers concerns with which *Boerne* is concerned. *Boerne*'s proportionality test is surely not intended to call into constitutional question congressional acts of restraint motivated by federalism considerations. From this perspective, VAWA's civil remedy meets any reasonable understanding of proportionality and congruence.

difficult to gain cooperation for necessary reforms in the states that most needed them. By making the civil rights remedy applicable to all jurisdictions, and by distributing funds nationwide, Congress avoided identifying particular states as especially blameworthy, and made clear that it wanted to pursue reform by working with all states on an equal footing.

The VAWA remedy is thus a proportionate and congruent response to state violations of the Fourteenth Amendment, narrowly crafted to protect federalism interests, and well within Congress' enforcement powers as defined by this Court's recent cases.

CONCLUSION

For these reasons, the judgment below holding VAWA's civil remedy unconstitutional should be reversed.

Respectfully submitted

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